**COURT-1**

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY**
**(Appellate Jurisdiction)**

**IA NO. 2056 OF 2019 IN**
**APPEAL NO. 421 OF 2019 &**
**IA NO. 1296 OF 2019 & IA NO. 471 OF 2020**

**Dated: 20th August, 2020.**

**Present: Hon'ble Mrs. Justice ManjulaChellur, Chairperson**
**Hon'ble Mr. S.D. Dubey, Technical Member**

**In the matter of:**

**Adani Power (Mundra) Limited .... Appellant(s) / Applicant**

**Vs.**

**Central Electricity Regulatory Commission &Ors. .... Respondent(s)**

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| Counsel on record for the Appellant/(s) / Applicant | Mr. Amit Kapur<br>Mr. Hemant Singh<br>Mr. Ambuj Dixit<br>Mr. Nishant Kumar |
| Counsel on record for the Respondent(s): | Ms. RanjithaRamachandran<br>Ms. Poorva Saigal<br>Ms. Anushree Bardhan<br>Mr. Shubham Arya<br>Mr. Arvind Kumar Dubey for R-2 & 3<br><br>Mr. Vikas Kadia, CE, HPPC *(Rep.)* |

## ORDER

**PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON**

**1.** Appeal No. 421 of 2019 is filed by the Applicant/Appellant-Adani Power (Mundra) Limited being aggrieved by the Order dated 28.03.2018 passed in Petition No. 104/MP/2017 by Central Electricity Regulatory Commission (for short "**CERC**"), whereby the CERC has disallowed the carrying cost towards the approved change in law event of the requirement to install Flue Gas De-sulphurizer (FGD) equipment.

**2.** It is the case of the Applicant/Appellant that subsequent to passing of the impugned order dated 28.03.2018, on 13.04.2018, this Tribunal vide its judgment dated 13.04.2018 in Appeal No. 210 of 2017 interpreted Article 13 of the PPA entered into between the Appellant and the Haryana Discoms to hold that carrying cost has to be paid by the distribution licensee while making payment of compensation for change in law event. Therefore, a decision was taken by the Applicant/Appellant on 26.06.2018, to move a

clarificatory petition before CERC. Accordingly, Applicant/Appellant filed a Petition being Petition No. 214/MP/2018 before CERC seeking clarification/modification of the order dated 28.03.2018 claiming relief towards additional auxiliary consumption of FGD on energy charges. In view of this Tribunal's judgment dated 13.04.2018 in Appeal No. 210 of 2017, the Appellant had also filed an Application being I.A. No. 70 of 2018 in the said Petition No. 214/MP/2018 claiming carrying cost on FGD. On 25.02.2019, the Hon'ble Supreme Court vide judgment dated 25.02.2019 passed in Civil Appeal No. 5865 of 2018 has upheld this Tribunal's Judgment dated 13.04.2018 in Appeal No. 210 of 2017.

**3.** CERC vide its order dated 06.06.2019 while rejecting the clarification petition observed that since the Commission had disallowed the relief of carrying costs qua FGD in the its earlier order dated 28.03.2018, the same cannot be granted through an application in the clarification petition. The relevant portion reads as under:

> "45. However, this Commission has already adjudicated the issue of carrying cost in its order dated 28.3.2018 in Petition No. 104/MP/2017. The

present Petition has been filed by the Petitioner, APML seeking certain clarification in the above order dated 28.3.2018. The Petitioner has filed I.A. No. 101/2018 seeking claim of IDC and FERV on actual basis pursuant to the liberty granted by the Commission in the said order. The Petitioner has also filed IA N. 70/2018 seeking carrying cost, based on subsequent judgment of the higher court. In our view, once the claim has been rejected by this Commission, the Petitioner cannot approach this Commission again for the same relief through an IA based on a subsequent judgment of the higher court. Therefore, the Petitioner is granted liberty to approach the Commission for appropriate relief through a separate Petition in accordance with law."

**4.** In view of the above and in view of the fact that the Appeal filed by the Applicant against the main Petition is pending before this Tribunal, the Applicant through the instant application seeks to amend the Appeal to incorporate its challenge to the later order dated 06.06.2019 passed by CERC in Petition No. 214/MP/2018 denying carrying cost on the event of change in law of FGD. By the present Amendment Application, the Applicant/Appellant has prayed for the following reliefs:

a) Allow the Applicant/ Appellant to amend the memo of appeal, being DFR No. 2199 of 2019, in terms of the details provided under the present application; and

b) pass any order and/or any such orders as this Tribunal may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.

**5.** We have heard learned counsel for the parties. They have filed their written submissions.

**6.** Learned counsel for the Applicant/Appellant has filed rejoinder/brief written submissions in support of his contentions, which are as under:

**(i)** Learned counsel for the Applicant contends that Order dated 06.06.2019 is in continuation of Order dated 28.03.2018, which relates to same Change in Law event, PPAs and between the same parties. To avoid multiplicity of proceedings and in the interest of justice it is necessary to

challenge both the Orders in the present Appeal. Learned counsel submits that by way of present application, the Applicant merely seeks to include the order dated 06.06.2019 within the ambit of challenge without altering any prayers or averments.

**(ii)** It is further submitted that from the time of claiming installation of FGD as a change in law event, the claim of carrying cost on the restitution allowed for expenditure incurred on FGD installation has been preferred before CERC which has been declined in both orders dated 28.03.2018 and 06.06.2019. Since the present appeal has been admitted and is pending adjudication, the amendment is a necessary procedural formality to obviate technical objections being taken for the order dated 06.06.2019.

**(iii)** Contending that CERC's Order dated 06.06.2019 modified its earlier order dated 28.03.2018 to allow relief towards additional auxiliary consumption of FGD on energy charges, while refusing to grant carrying cost, learned counsel points out that in refusing carrying cost, CERC has

acted in a hyper-technical manner ignoring a binding interpretation of Article 13 of the same PPA between the same parties by this Tribunal's Judgment dated 13.04.2018 and Hon'ble Supreme Court Judgments dated 11.04.2017 and 25.02.2019 approving grant of carrying cost on allowed change in law claims.

**(iv)** In support of the contention that it is a settled principle of law that courts should not adopt pedantic approach to defeat justice on mere technicalities, learned counsel places reliance upon the Judgment of the Supreme Court in "***Ram Sarup Gupta v. BishunNarain Inter College"*, *(1987) 2 SCC 555 [Para 6]***. He also places reliance on the judgment of the Hon'ble Supreme Court in "***Ramesh kumar Agarwal v. Rajmala Exports (P) Ltd.,"*** **reported in *(2012) 5 SCC 337*** to state that it is a settled law that the power to allow amendment is undoubtedly wide and the same can be exercised at any stage in the interest of justice, and to avoid multiplicity of proceedings. He also

places reliance on the order of this Tribunal passed in IA No. 56 of 2014 in Appeal No. 97 of 2013 dated 12.11.2014.

**(v)** Placing reliance on the above judgments, learned counsel submits that amendment must be permitted to avoid duplicity of proceedings. In this case if the instant Application is not allowed, the Applicant/Appellant will be compelled to initiate multiple proceedings for the same issue between the same parties. He submitted that the Respondents in the present Appeal have not even filed their reply to the main Appeal. Hence, if the instant Application is allowed then no prejudice would be caused to the Respondents. Moreover, the Applicant/Appellant is not raising any additional grounds by way of the Amendment.

**(vi)** It is stated that the contention of the Haryana Discoms that Petition No. 214/MP/2018 was not in the nature of a review is erroneous since CERC at *para 30 of the order dated 06.06.2019* clarified that in terms of decision at Para 47 of the order dated 28.03.2018, the relief granted to the Appellant is not restricted to capacity charge and that

the same would include relief for energy charge on account of additional auxiliary consumption. At *para 25, CERC also held* that the impact of FGD installation on energy charge, has to be considered in continuation of the earlier order dated 28.03.2018. As such, there is modification of the earlier order dated 28.03.2018 passed in Petition No. 104/MP/2017. In this regard, it is submitted that once there is modification of an earlier Order, even though the petition seeks a clarification, the same is in the nature of a review. An order arising out of a clarificatory/review petition has to be challenged in the same appeal which has been filed against the original order. There cannot be separate appeal against a clarification order, which modifies an earlier order, and as such it is in the nature of review of the earlier order. In support of this contention, learned counsel has placed reliance on the following judgments: -

***a) Delhi Administration vs Gurdip Singh Uban, (2000) 7 SCC 296 (Para 17)***

***b) Sanjay Bhargavavs Seema Bhargava, 2014 SCC OnLine Del 3707 (Para 16);***

**(vii)** According to the Applicant/Appellant the objection raised by Haryana Discoms that by way of the present amendment, Applicant/Appellant is trying to expand the scope of the Appeal has no merit, since the issue involved in the entire proceedings is limited to carrying cost on FGD only.

**(viii)** Lastly, learned counsel submits that the amendment sought is *bonafide* in order to obviate technical procedural objections coming in the way of effective adjudication of the present appeal and defeating substantive rights of the Appellant which have been reaffirmed in judgments of the Hon'ble Supreme Court and this Tribunal. Further it is submitted that if necessary the Appellant would pay the additional court fees to challenge a second order.

**7.** Learned counsel for Respondent Nos.2 and 3 has filed reply/brief written submission, opposing the proposed amendment, which is as under:

**(i)** Contending that the Appeal against Order dated 06.06.2019 is time-barred, learned counsel submits that the Appellant is seeking to raise a time barred claim ~~appeal~~ by way of amendment instead of filing a separate appeal. He contends that the Amendments cannot be allowed, which raise new claims, for which limitation has expired.

**(ii)** The present Appeal is filed on 14.07.2019 much after the Order dated 06.06.2019. At that stage, the Appellant did not choose to challenge the Order dated 06.06.2019. Now the Appellant cannot claim that the appeal against Order dated 06.06.2019 was filed in time based on the filing of the appeal against another order dated 28.03.2018 (impugned order).

**(iii)** The present Amendment application is filed on 18.11.2019, which is substantially after 45 days from the Order dated 06.06.2019, and there is no explanation or reason for the delay in filing. He contends that the Appellant has claimed in the application for condonation of delay, which was filed along with the appeal challenging the order dated 28.03.2018 that it

had been pursuing the issue in Petition No. 214/MP/2018, and it was only after the Order dated 06.06.2019 was passed in the said petition, the Applicant/Appellant decided to file an appeal against Order dated 28.03.2018. Such being the case, he contends that, there is no reason why the Appellant did not challenge the Order dated 06.06.2019 at that stage and within the time prescribed. The Appellant has just sought to rely on the fact that the delay of 429 days in this Appeal against Order dated 28.03.2018 was condoned. However, the issue is not the number of days delay but justification for the said delay is important. When there is no justification or explanation, even a few days' delay cannot be condoned.

**(iv)** Further, the amendment sought is not due to any subsequent development. The Order dated 06.06.2019, which the Applicant now seeks to challenge, had been passed before filing of the present appeal. In the case of ***"NTPC Ltd v. Central Electricity Regulatory Commission and others***" dated 12.11.2014 in IA No. 56 of 2014, it is observed that

Courts should decline amendment if a fresh suit on amended claims would be barred by limitation.

**(v)** Learned counsel contends that there cannot be a combined appeal for two different orders. In other words, a common appeal cannot be filed against two separate orders of the Regulatory Commission. It is not permissible to combine orders passed in separate proceedings in separate petitions in a single appeal. The two orders sought to be combined are passed in different petitions being Petition No. 104/MP/2017 and 214/MP/2018. According to him, the Appellant has to file two separate appeals.

**(vi)** Learned counsel contends that avoiding multiplicity of proceedings does not mean that varied orders passed by the lower courts can be combined in a single appeal.

**(vii)** Learned counsel contends that further, Petition No. 214/MP/2018 was not a review petition to review the order dated 28.03.2018. The said Petition was filed as an

adjudication of dispute and the same cannot be sought to be linked as if it is a review of the Order dated 28.03.2018. The fact that there was a subsequent decision by the superior court is also not a ground for review in any case. The attempt of the Applicant to raise the decided issue in a subsequent proceeding is contrary to law.

**(viii)** According to the learned counsel, there was no modification of the order dated 28.03.2018 by the Central Commission. The Central Commission interpreting the order dated 28.03.2018 has rendered its finding on the issue of auxiliary consumption and did not grant any new relief. Clarification does not mean 'grant new relief'. In any case, the Appellant is not challenging the issue of auxiliary consumption.

**(ix)** The reliance placed by the Appellant on the decisions of the Hon'ble Courts with regard to the issue of review/clarification is misplaced. The Appellant has only referred to the judgment without extracting the relevant paras. According to the Respondents, in those Judgments the Courts

have deprecated the practice of filing of applications for clarification/modification which are in effect and in fact an application for review. Further the judgment of the Hon'ble Supreme Court only states that if the application for clarification is disguising a review, it would not be considered. The adjudication of dispute on interpretation by way of clarification of earlier orders cannot be considered which are in the nature of review. According to him, this would mean that even some years after the original order is passed, the same can be modified by way of filing a clarification petition (much beyond the limitation for review) which is treated as review and the orders be treated as having merged.

**(x)** In this context, learned counsel states that the judgments relied on by the Appellant are dealt with by the Court as under:

a) Delhi Administration –v- Gurdip Singh Uban&Ors., reported in (2000) 7 SCC 296 (Para 17)

In this judgment, the issue before the Hon'ble Supreme Court inter alia was:

*"13 The following points arise for consideration:*

*(1) Whether a party who had lost his case in civil appeal could be permitted to bypass the procedure of circulation in review matters and adopt the method of filing applications for "clarification", "modification" or "recall" of the said order in civil appeals so that the matters were not listed in circulation but could be listed in Court straight away? Whether such applications could be filed even after dismissal of review applications? What is the procedure that can be followed in such cases?*

The decision of the Hon'ble Supreme Court was:

***17****. We next come to applications described as applications for "clarification", "modification" or "recall" of judgments or orders finally passed. We may point out that under the relevant Rule XL of the Supreme Court Rules, 1966 a review application has first to go before the learned Judges in circulation and it will be for the Court to consider whether the application is to be rejected without giving an oral hearing or whether notice is to be issued.*
*Order XL Rule 3 states as follows*

*……..*

*In case notice is issued, the review petition will be listed for hearing, after notice is served. This procedure is meant to save the time of the Court and to preclude frivolous review petitions being filed and heard in open court. However, with a view to avoid this procedure of "no hearing", we find that sometimes applications are filed for "clarification", "modification" or "recall" etc. not because any such clarification, modification is indeed necessary but because the applicant in reality wants a review and also wants a hearing, thus avoiding listing of the same in chambers by way of circulation. Such applications, if they are in substance review applications, deserve to be rejected straight away inasmuch as the attempt is obviously to bypass Order XL Rule 3 relating to circulation of the application in chambers for consideration without oral hearing. By describing an application as one for "clarification" or "modification", — though it is really one of review — a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a*

*hearing in the open court. What cannot be done directly cannot be permitted to be done indirectly. (See in this connection a detailed order of the then Registrar of this Court in SoneLal v. State of U.P. [(1982) 2 SCC 398] deprecating a similar practice.)*

***18**. We, therefore, agree with the learned Solicitor General that the Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance one for review. In that event, the Court could either reject the application straight away with or without costs or permit withdrawal with leave to file a review application to be listed initially in chambers.*

*…….*

***20**. We should not however be understood as saying that in no case an application for "clarification", "modification" or "recall" is maintainable after the first disposal of the matter. All that we are saying is that once such an application is listed in Court, the Court will examine whether it is, in substance, in the nature of review and is to be rejected with or without costs or requires to be withdrawn with leave to file a review petition to be listed in chambers by circulation. Point 1 is decided accordingly."*

In this judgment, the Hon'ble Supreme Court has held that clarification is not same as review, but in case of an application for clarification is in nature of review, it would be refused with leave to file review petition. According to the learned counsel, this makes it clear that the purpose of application for clarification or modification is different than the purpose of review and the same cannot be mixed up.

b) Sanjay Bhargava–v-SeemaBhargava, reported in 2014 SCC OnLine Del 3707 (para 16);

> ***"16****. As far as the injunction sought by the plaintiff by filing of the fresh application is concerned, the same is not maintainable as the order dated 3-5-2013 attains the finality while disposing of the plaintiff's injunction application as well as the defendant's application under Order 39 Rule 4 CPC and all the pleadings were available before the Court when the said applications were disposed of in the presence of the said parties. The defendant has also not challenged the said order before Court. No change of circumstances is shown by the defendant for the purpose of getting the said order vacated by filing the fresh application under Section 151 CPC. All the documents and pleas raised by the defendant were already available on record when order dated 3-5-2013 was passed. In a way, the defendant is seeking the review of the order after a period of about ten months. The expressions "modification" and "clarification" used by many parties nowadays have been dealt with by the Supreme Court in many cases over and again and it is held that in fact, it amounts to review of the order. In the present case, no review or application for condonation of delay has been filed by the defendant. Even otherwise, this Court is of the view that once the interim application and vacation application are decided on merit in the presence of the order which has attained finality unless change of circumstances. In the present case all the documents referred by the defendant's counsel were available when the order dated 3-5-2013 was passed. As far as waiving of condition is concerned, the said order at this stage cannot be reviewed for the reason that the entire possession of the suit property is with defendant who is not sharing any rent with the plaintiff."*

In this judgment, the Hon'ble High Court refused to entertain an application since it would amount to review

and held that the expressions 'modification' or 'clarification' are used which in fact amount to review.

**(xi)** It is submitted that if the Appellant had asked for review of the order under the guise of clarification, the Central Commission would have refused to entertain the request. This is the reason for rejection of the prayer with regard to carrying cost as it was in effect seeking to challenge the earlier order.

**(xii)** Learned counsel points out that both the judgments referred to above deal with the applications for clarifications filed in the same Petition/Appeal whereas in the present case there are two separate Petitions and two separate orders, one order dated 28.03.2018 in Petition No. 104/MP/2017 and another Order dated 06.06.2019 in Petition No. 214/MP/2018. Therefore, these two orders cannot be treated as one.

**(xiii)** It is submitted that the Applicant is seeking to expand the scope of the Appeal and cause of action by raising new issues and grounds, which is not permitted. According to him, the

issue of powers of the Central Commission to grant relief which has already been rejected in its earlier orders is a completely new cause of action and that cannot be related to the present Appeal.

**(xiv)** The issue involved in the present Appeal is on the principle of carrying cost. The Questions of law and the Grounds now sought to be included through Amendment Application relate to the powers of the Central Commission to consider an issue already decided in the previous orders. Therefore, it is clear that the questions of law and grounds sought in the Application for Amendment are different than that of the questions of law and grounds raised in the Appeal. In this regard, learned counsel relies on the decision of the Hon'ble Supreme Court in RajkumarGurawara–v-S.K. Sarwagi and Co. (P) Ltd., (2008) 14 SCC364 at page 369.

**(xv)** In view of the above, learned counsel prays that the application for amendment of the appeal is liable to be dismissed.

## *Analysis*

8. Heard both the parties and gone through the written submissions.

**9.** Apparently, the above Appeal is filed against the Order of Central Electricity Regulatory Commission dated 28.03.2018 in Petition No. 104/MP/2017. Now the Appellant intends to bring on record additional facts, so also reliefs pertaining to carrying cost by way of amendment. Subsequent to the Order dated 28.03.2018, the Appellant filed Petition No. 214/MP/2018 seeking modification/clarification of the earlier Order. In this Petition pending before the CERC, IA No. 70 of 2018 was filed claiming carrying cost on FGD amount. So far as carrying cost *qua* FGD, CERC did disallow the same by earlier Order dated 28.03.2018. Therefore, while passing subsequent order on carrying cost, vide Order dated 06.06.2019 rejecting clarification Petition, the CERC opined that since issue of carrying cost was already adjudicated upon in the Order dated 28.03.2018, therefore, clarification Petition and also IA No. 70 of 2018 seeking carrying cost subsequent to the judgment of the Hon'ble Supreme Court cannot be entertained. They further opined

that the same relief through IA and clarification cannot be sought. However, liberty was reserved to the Appellant to approach the Commission for appropriate relief through separate Petition in accordance with law.

**10.** Apparently, carrying cost in both the Orders of CERC were disallowed. Admittedly, the present Appeal is filed subsequent to the Order dated 06.06.2019.

**11.** From the various judgments referred to above, it is seen that there cannot be multiplicity of proceedings. The Appeal against Order dated 28.03.2018 is admitted and pending adjudication. The Appellant is seeking relief placing reliance on Article 13 of the PPA between the parties. So far as grant of carrying cost by this Tribunal by its Order dated 13.04.2018, the same came to be approved by the Hon'ble Supreme Court by its Order dated 25.02.2019. It is also well settled that one cannot adopt pedantic approach or super technical approach if such approach defeats justice.

**12.** It is seen from the arguments of the Respondent's counsel that under the guise of clarification, one cannot seek review of the Order.

The purpose of clarification/modification is different from the purpose of seeking review. This principle must be remembered not only by the Commissions but also this Tribunal, so also all subordinate courts. Respondent's counsel also contends that if amendment is intended to expand the scope of the Appeal by raising new issues and grounds, it cannot be allowed.

**13.** The Appeal is continuation of the original proceedings. This is settled law. It is not a case where the Appellant had not asked for carrying cost in the Original Petition filed before the CERC. As a matter of fact, carrying cost was disallowed in the first Order dated 28.03.2018. In the second Order dated 06.06.2019, such relief of carrying cost was also disallowed, since the Commission had rejected such claim on merits in its earlier Order dated 28.03.2018. The clarification/modification pertaining to carrying cost was nothing but seeking review of the earlier Order of the Commission. This approach of the Commission declining to entertain the clarification pertaining to carrying cost cannot be found fault with. Therefore, one has to opine that such clarification/application was not in accordance

with law declared by the Apex Court. Therefore, we presume that it is non-est in the eye of law.

**14.** Since carrying cost relief was pursued by the Appellant right from the first Petition No.104/MP/2017 onwards, we are of the opinion that it is not a new claim or relief sought by the Appellant. Since the Appeal is continuation of original proceedings, we are of the opinion that there is no change of cause of action. Clause 13 of the PPA is the foundation for seeking grant of carrying cost. The decision of the Hon'ble Supreme Court is only an additional ground to support the claim of the Appellant. Therefore, we cannot accept contention of the Respondents that by the present amendment, the Appellant is seeking introduction of new relief based on new cause of action.

**15.** For the reasons stated above, we are of the opinion that the amendment sought by the Appellant deserves to be allowed to meet the ends of justice. Accordingly, IA No. 2056 of 2019 is allowed.

**16.** No order as to costs.

**17.** The Appellant shall carry out amendment sought within a week and shall file the amended Appeal Memo within two weeks with

advance copy to the other side. The Respondents shall file consolidated reply, if any, within four weeks from the date of filing of amended Appeal before this Tribunal with advance copy to the other side.

**18.** List the matter on ***30.9.2020***.

**19.** Pronounced in the Virtual Court on this the 20th day of August, 2020.

**(S.D. Dubey)**
**Technical Member**

**(Justice Manjula Chellur)**
**Chairperson**

*ts/tpd*